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No. 85-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RICHARD ROE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:	Page
Burroughs v. United States, 290 U.S. 534 (1934) .	3
Cobbledick v. United States, 309 U.S. 323 (1940).	2
Finch v. United States, 433 U.S. 676 (1977).....	3
Gay v. Ruff, 292 U.S. 25 (1934).....	3
Gooding v. United States, 290 U.S. 534 (1934) ...	3
In re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985) *(en banc)*.....	4
Serfass v. United States, 420 U.S. 377 (1975)	3
United States v. Nixon, 418 U.S. 683 (1972)	3
United States v. Ryan, 402 U.S. 530 (1971)	2
Statutes:	
28 U.S.C. §1254	3
28 U.S.C. §1257	3
Other Authorities:	
Legal Times (February 17, 1986)	1-2

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1. Our petition for certiorari presents a constitutional issue that has generated a square difference of opinion among the Circuits. A senior Department of Justice attorney, writing on the subject in a very recent national legal periodical, said (footnote omitted):[1]

> Only the Supreme Court can provide the definitive answer on whether the act of production doctrine can shield a custodian of corporate and partnership records from providing records to a

1. Levitt, "Act of Production: 5th Amendment Law Unsettled," *Legal Times*, February 17, 1986, pp. 10, 14-15.

grand jury. With the differing viewpoints evident in the courts of appeals, it would seem that the Court should act promptly to resolve the uncertainty that now exists.

2. Rather than addressing the constitutional issue and the importance of resolving it for the guidance of lower courts, prosecutors, and defense counsel, the Solicitor General refuses to "respond . . . on the merits to the questions presented by the petition." Memorandum for the United States in Opposition, p. 3, n. 3. Instead, he advances a totally untenable jurisdictional argument. The Solicitor General contends in his Memorandum that, as a result of the court of appeals' decision, petitioner is "in exactly the same position that he would have occupied if the district court had not quashed the subpoenas, but had not yet held him in contempt for failure to comply." *Id.* at 1, 2. Accordingly, citing *United States* v. *Ryan*, 402 U.S. 530 (1971), and *Cobbledick* v. *United States*, 309 U.S. 323 (1940), the Solicitor General claims that the decision below "is not final" until petitioner has been held in contempt, and review is, therefore, "premature." Memorandum for the United States in Opposition, pp. 2, 3.

The *Ryan* and *Cobbledick* cases apply, of course, when a pre-trial motion to quash is *denied* by the district court. In order to avoid piecemeal review, a final order — such as a judgment of contempt — is required before an appeal may be taken. But if a district court upholds the movant's position and grants his motion to quash — as the district court did here — there is no occasion for any contempt sanction. The government's appeal then presents the court of appeals with the question whether the district court was correct. And if the government prevails in the appellate court — as it did in this case — it would be needlessly time-consuming to require that the district court enter an order of contempt before this Court may consider the issue on which the district court

and the court of appeals disagreed. Indeed, requiring the movant to return to the district court for entry of a contempt sanction would amount to interlocutory enforcement of the very decision of the court of appeals that the petition for certiorari is challenging in this Court.

This Court regularly entertains, and has frequently granted, petitions for certiorari in similar circumstances. If, for example, a district court dismisses an indictment and the government secures a reversal of the dismissal in the court of appeals, one might similarly contend that the defendant is "in exactly the same position that he would have occupied if the district court had not" dismissed the indictment. That analogy does not, however, deprive this Court of jurisdiction to review the validity of the court of appeals' decision. For example, in *Serfass* v. *United States*, 420 U.S. 377 (1975), this Court granted certiorari even though the court of appeals had reversed the dismissal of an indictment. *See also Finch* v. *United States*, 433 U.S. 676 (1977). Similarly, in *Gooding* v. *United States*, 416 U.S. 430 (1974), this Court granted certiorari even though the court of appeals had reversed a pretrial evidentiary suppression order. *See also Burroughs* v. *United States*, 290 U.S. 534 (1934).

Nor, indeed, is there any "final judgment" rule governing review by this Court of decisions of the federal courts of appeals. *Compare* 28 U.S.C. §1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods . . .") *with* 28 U.S.C. §1257 ("Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows . . ."). Justice Brandeis noted in *Gay v. Ruff*, 292 U.S. 25, 30 (1934), that the jurisdictional language went so far as to authorize review even before the court of appeals renders a decision — "the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." *Accord*, *United States* v. *Nixon*, 418 U.S. 683, 692 (1972).

3. Particularly deplorable is the Solicitor General's assertion that petitioner is "frustrating" the grand jury because 16 months have elapsed since the subpoenas were served. The Solicitor General ignores the fact that much of the 16-month period is attributable to the Government. The petitioner prevailed after a prompt hearing in the district court. A total of six months elapsed between that decision and the ruling of the court of appeals on the Government's appeal. More recently, it was the Solicitor General who told this Court's Clerk on January 21, 1986, that he could not respond promptly to our petition, which had been served on December 18, 1985 (within 30 days of the final ruling by the court of appeals), because the attorney preparing the response needed "[a]dditional time to complete the response and have it prepared for filing." On the last day of the extended period, the Solicitor General's response, covering barely two pages, was served in mimeographed form. The Solicitor General is hardly in a position to blame "additional delay" on the petitioner.

4. One may infer from the Solicitor General's transparent attempt to divert this case from the Court's docket that the Solicitor General hopes that the important constitutional issue that has split the Circuits may arise in the future in a factual context more sympathetic to the government's position than is presented by this case. Indeed, the desire to bring to this Court only the most favorable factual pattern may explain the Solicitor General's decision not to seek review of the Third Circuit's *en banc* ruling in *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (1985). Such manipulation of this Court's docket is not, however, the appropriate function of the Solicitor General.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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